

IN THE MATTER OF the HUMAN RIGHTS CODE, R.S.O. 1990, c.H. 19, as amended;

BETWEEN

PATRICIA BARBER

Complainant

-and-

SEARS CANADA INC.

Respondent

BEFORE: H.A. Bassford
Chair, Board of Inquiry

Hearings: Toronto, Ontario
November 18, December 21, 1992
March 19, June 18, July 14, 1993

St. Catharines, Ontario
March 10, 16, 17, 18, April 19,
May 6, 7, July 15, 16, 1993

APPEARANCES: Fiona Campbell
Counsel for the Human Rights Commission

Mary Beth Currie
Counsel for Sears Canada Inc.

DECISION

I was appointed on October 19, 1992 by the Minister of Citizenship, the Honourable Elaine Ziemba, to chair a board of inquiry pursuant to the Human Rights Code, R.S.O., 1991, c.H.19, as amended. The Board was instructed to hear the matter of the complaint made by Patricia Barber on Dec. 6, 1988 against Sears Canada Inc. The complaint alleged discrimination with respect to facilities on the basis of handicap, alleging violation of sections 2, 9 and 11 of the Human Rights Code. The hearing into this matter commenced by conference call on November 18, 1992. There were thirteen additional hearing days, ending July 16, 1993. Hearings were held in both St. Catharines and Toronto. Two interim decisions on preliminary matters have been issued, on January 6, 1993 and March 14, 1993. It should be noted here with respect to these matters that Ms. Barber died in the week prior to November 30, 1992. The preliminary decision of March 14, 1992 gave reasons for not staying the proceedings due to the death of the complainant.

The Sears Canada Inc. store located at the Pen Centre Mall in St. Catharines offers goods to the public on two stories. Customer access to the second floor is gained by means of an escalator, by stairs, or by a freight elevator for those customers "uncomfortable or unable to use the escalator or stairs (elderly, customers with strollers, handicapped, etc.) (Exhibit #16).". Access to and use of the elevator requires the assistance of a Sears employee, who operates the elevator between floors. Employees are summoned by pushing a call bell located in the foyer area.

The initial complaint alleged that in May, 1988, the Complainant, who used a wheel chair for mobility, was told to use the freight elevator, and that she had to wait approximately half an hour in order to gain access to the second floor. This particular allegation was not challenged by counsel for the respondents. The contention is that because of the delay, and because of the requirement of assistance from Sears' staff, the Complainant's access to the store was not equal to that of able bodied persons. Because of this it is alleged that her right to equal treatment with respect to facilities, without discrimination because of handicap was contravened.

The complaint was amended on July 5, 1989. The Complainant asserted in addition to her original complaint that she was denied access to the second floor washrooms, and that these washrooms were not accessible to handicapped persons. Sears Canada Inc. made renovations to the washrooms, and that aspect of the complaint was not an issue before this board.

RENOVATIONS TO ELEVATOR

The amended complaint was served on Sears by letter dated July 19, 1989, with Sears filing a Respondent Questionnaire on

August 9, 1989. On January 25, 1990 the Human Rights Officer, Ms Jostman, and representatives of Sears met. At that time Trilea Centres Inc. had advised of its intent to install a passenger elevator in the common mall area as part of a redevelopment of the mall. When this information was transmitted to Ms. Jostman, she advised that if it were constructed, she would recommend to the Commission that the public elevator provided access to both store levels. Trilea Centres Inc. did not, however, proceed with the redevelopment, nor construct the elevator.

On April 20, 1990 the Commission advised Sears that Ms. Jostman had been promoted and that a new Officer would be assigned the case. Between this time, and November 29, 1990, when Mr. Wayne McCullough advised he had been appointed to investigate the complaint, Sears renovated the washrooms at the store.

On March 7, 1991 representatives of the Commission and of Sears met to discuss resolution of the outstanding complaint. At this meeting they spoke with Mr. N.L. Benn, Manager, Field Operation, Elevating Devices Branch, Ministry of Consumer and Commercial Relations. Mr. Benn advised that the existing freight elevator could be renovated in order to be licenced to carry passengers in limited circumstances, and that a variance to the elevator licence could be issued. Sears proposed to obtain an estimate of costs from Dover Elevators, the designer and installer of the freight elevator, and depending upon whether the proposed renovations were viable, to proceed with the renovations. The parties kept in touch with respect to the progress of the renovations, and agreed to consult upon the completion of the renovations.

The renovations were completed on November 4, 1991. They involved changes both to the foyer areas and to the elevator itself. The foyer area was made to look part of the sales area rather than a freight area. The floors were tiled, walls constructed and painted so stock areas were not visible, and a suspended ceiling provided. The elevator was modified so that the doors, which open vertically on freight elevators, had a safety or reversing edge, such that the door would reopen if it were to hit somebody. In addition passenger sequence operation of the doors was provided. This means that the car door would operate first when opening or closing, and that the hall door would open or close only after the car door was fully opened or closed. Further, the floor of the elevator was marked to show where the clear area is when the door closes. In addition, there were cosmetic changes to the elevator. Carpeting was put around the edges and the inside of the elevator and the inside of the elevator shaft which was visible from the elevator were painted.

In addition to the renovations signage indicating the location of the elevator was improved. Finally, staff were

trained to respond to the buzzer and operate the elevator for customers who need to use it.

The Ministry of Consumer and Commercial Affairs inspected the elevator on November 19, 1991, and approved the variance requested. Mr. McCullough, the Human Rights Officer, examined the alterations to the elevator and washrooms on March 17, 1992. The Case Summary (Exhibit 15) shows his conclusion that "the respondent has made the necessary changes to accommodate the complainant." The Complainant did not concur in this conclusion. Sears provided its submission to the Commission in support of the Officer's report on April 22, 1992. On August 25, 1992, the Commission advised that the Commission had requested that the Minister of Citizenship appoint a Board of Inquiry.

Both Counsel agreed that Sears Canada Inc., Pen Centre provides services to the public on both floors, and that Mrs. Barber was a handicapped person. Accordingly, the question before this Board is whether the access provided to the second floor by the freight elevator violates Ms. Barber's right to equal treatment with respect to services, and if so whether Ms. Barber's needs cannot be accommodated without undue hardship on the part of Sears Canada Inc.

LEGAL ISSUES

Kind of Discrimination

There was some question between Counsel as to whether the putative discrimination should be considered direct or adverse effect discrimination. The relevant sections of the Human Rights Code are Sections 1 and 11. Counsel for the Commission argued that the instant case could be interpreted, alternatively, as either direct or adverse effect discrimination. Counsel for the Respondent argued that it should be interpreted as adverse effect discrimination, and that Section One therefore would not apply.

Section 1 reads:

Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

Section 11 (1), reads:

A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who

are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

The distinction between the two sorts of discrimination is stated in Ontario Human Rights Commission and O'Malley v. Simpson Sears [1985] 2 S.C.R. 536 (S.C.C.). Speaking with respect to discrimination in employment, McIntyre J. says,

The idea of treating as discriminatory regulations and rules not discriminatory on their face but which have a discriminatory effect, sometimes termed adverse effect discrimination, is of American origin and is usually said to have been introduced in the Duke Power case ... in the Supreme Court of the United States. In that case the employer required as a condition of employment or advancement in employment the production of a high school diploma or the passing of an intelligence test. The requirement applied equally to all employees but had the effect of excluding from employment a much higher proportion of black applicants than white. It was found that the requirements were not related to performance on the job, and the Supreme Court of the United States held them to be discriminatory because of their disproportionate effect upon the black population (p.550 (d-h)).

This is then contrasted with direct discrimination.

Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here (p.551 (b))."

The line between the two sorts of discrimination is not always clear, as is pointed out by David Lepofsky in his article, "The Duty to Accommodate: A Purposive Approach, Canadian Labour Law Journal, vol. 1 (1992), p.18.

An example demonstrates this. Assume that a school board operates public schools which are inaccessible to wheelchairs. A mobility-impaired child who cannot attend such a school on account of its physical inaccessibility could bring a human rights complaint alleging discrimination because of handicap with

respect to access to the public service of education. This would traditionally be classified as a garden-variety case of adverse effect discrimination. The building was not designed with staircases out of any intent to keep disabled children out.

However, assume further that the problem of inaccessibility is repeatedly brought to the school board's attention, and that year after year the board appropriates no funding to provide needed retrofitting of existing schools. Indeed, the board continues expanding into inaccessible facilities. At some point, this conduct becomes a matter of intentional discrimination.

The present case, however, appears to fall conceptually into the adverse effect category rather than that of direct discrimination, and does not seem to be one which falls into the vague border area between the two. The analogy with Mr. Lepofsky's example is significant. The Sears Canada Inc. store at ~~Penn~~Centre was constructed at a time before handicap was a ground for discrimination under the Human Rights Code, and before the needs of the handicapped were significantly considered in the construction of retail establishments. The store was not constructed with an escalator and freight elevator out of any intent to exclude or restrict people with mobility impairments from shopping on the second floor. Nor has Sears Canada Inc. since articulated any rule or policy which has such an intent. Further, the Respondent has not ignored the problems of accessibility which have been brought to their attention by the Complainant. Sears Canada Inc. has made alterations in the freight elevator in an attempt to accommodate. Accordingly, the case is not one of intentional or direct discrimination.

The means of access to the second floor could, however, be discriminatory in their effect. The relevant factor is the means of access provided to the second floor. Persons who use wheelchairs for mobility, as was the case for the Complainant, physically cannot use the escalator, so must depend upon the freight elevator for access to the second floor. If the conditions of using the freight elevator are such that wheelchair users are restricted in their access, when compared to ordinarily abled persons who use the escalator, then there would be a case of adverse effect discrimination. Unless this factor were shown to be reasonable and bona fide in the circumstances, the case would fall under Section 11 of the Human Rights Code.

It is to be noted that the absence of any direct discrimination does not imply, as suggested by Counsel for the Respondent (v. 12, p.45); "that there has been no contravention of Section 1 of the Code." Part II of the Human Rights Code provides interpretation and application of Part I. If Section 11

applies to a particular case, then, to quote from the Section, "A right of a person under Part I is infringed...." In the present case the right which would be infringed is one of those stated in Section 1, namely the right to equal treatment with respect to services without discrimination because of handicap.

Equality of Treatment

The question then is whether, in comparison to the general public, use of the freight elevator restricts the mobility of impaired or whether it provides them with equal treatment with respect to access to the second floor of the Sears store at Penney Centre. Some discussion of the notion of equality is necessary as a preliminary to answering this question. A

It has been recognized since Aristotle that equal treatment is not necessarily equivalent to identical treatment. The Supreme Court makes this point in Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143 (S.C.C.). It says of equality (p.164, g),

It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.

It is, however, not enough to treat different individuals differently. Rather, equality of treatment requires that individuals be treated in such a way as to accommodate their differences. The Court states this in Andrews on pp. 168-169.

It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the Charter. It is, of course, obvious that legislatures may -- and to govern effectively -- must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions.

The notion of accommodation of differences becomes explicit

in the Code in those sections dealing with undue hardship. This can be seen in both sections 11 (2) and 17. Section 17 deals with handicap specifically, and specifies when a right is not infringed because of handicap. The parts to be noted read as follows.

(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

(1a) The Commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

In the case of the handicapped the relevant differences are the ways in which they are differently abled from the general public, and the needs involved are those which arise out of these differences. Accordingly, a person with a handicap will have equal treatment with respect to services if the service is provided in such a way as to accommodate the needs of that person which arise because of the handicap.

Counsel for both the Commission and the Respondent were clear that accommodation in the present case would require not only access to the second floor for mobility impaired persons, but access with dignity. This is because of the special nature of human rights legislation, which requires the words employed, such as "to accommodate," be given a purposeful rather than narrow interpretation. This was made explicit by the Supreme Court in Ontario Human Rights Commission and O'Malley v. Simpson Sears (supra. at 546-7).

There [in the preamble] we find enunciated the broad policy of the Code and it is this policy which should have effect. It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment ... and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its

purpose and give it effect.

The broad policy of the Human Rights Code is given in the first two paragraphs of the preamble, wherein it emphasizes the dignity and worth of each person.

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

Accordingly, accommodation of the needs of the handicapped entails providing for their needs in a way which respects their dignity and worth. In the present case the mobility impaired will be treated equally only if they are provided with access to the second floor in a way which meets the physical needs occasioned by their disability and which does so in a way which respects their dignity.

"Dignified" and "Most Dignified"

One further conceptual point needs to be clarified before proceeding. While Counsel for the Respondent referred regularly to "dignified access" or "access with dignity," Counsel for the Commission at various points in both examination and argument referred to the "most dignified" means of access to the second floor, or the option which "most respects dignity." It is important to determine which locution is appropriate for determining accommodation.

The latter distinction is derived from the Guidelines for Assessing Accommodation Requirements for Persons with Disabilities Under the Ontario Human Rights Code, 1981, as Amended, which were prepared by the Human Rights Commission (Exhibit #26). The purpose of the guidelines is to state (p.2),

the Commission's interpretation of what is meant by accommodation of the needs of persons with disabilities and what will constitute undue hardship in the context of disability complaints. It is hoped that the

guidelines will help persons with disabilities, persons responsible for accommodation, and the general public to understand and apply the concepts of accommodation and undue hardship.

Under the section entitled "Standards for Accommodation," the Commission states what it terms the "Requirement of Accommodation" and adds a commentary section which develops its interpretation of accommodation. The relevant parts read as follows (p.5).

1. Requirement of Accommodation

THE NEEDS OF PERSONS WITH DISABILITIES MUST BE ACCOMMODATED IN A MANNER WHICH MOST RESPECTS THEIR DIGNITY, IF TO DO SO DOES NOT CREATE UNDUE HARDSHIP. ...

Commentary

A. ... Accommodation is a matter of degree, rather than an all-or-nothing proposition. Different ways of accommodating the needs of persons with a disability can be drawn along a continuum from those means which are most respectful of privacy, autonomy, integration and other human values, to those which are least respectful of those values. Perhaps the most common example of an accommodation which demonstrates little respect for the dignity of a person with a disability is a wheelchair entrance over the loading dock or through the garbage room.

B. There is also a continuum with respect to how the accommodation may be accomplished. At one end of this continuum would be full accommodation (i.e. that which would most respect the person's dignity)

It is clear that in the Commission's view "accommodation" is a relative term, and that "full" accommodation is that which most respects dignity. Further, the standard of accommodation is that which most respects dignity. If this interpretation were accepted, then the standard suggested by Counsel for the Commission would be the appropriate one to apply to the present case.

Before deciding whether they are the appropriate standard, the status of the Guidelines should be clarified. As is noted in the Guidelines themselves, "They are subject to interpretations of boards of inquiry and the courts and should be read in conjunction with those decisions and with the specific language of the Code." I stated my interpretation of this during the course of the hearing when ruling upon the admissibility of the testimony of Ms. Catherine Frazee, given as evidence about the

development of the Guidelines. That was (Transcript, v.10, pp.3-4),

... the Guidelines do represent the Commission's interpretation and analysis of the Code with respect to accommodation requirements for those with handicaps. As such they do not have the force of law and they do not bind any board of inquiry. ... They are, however, relevant to the instant case, a matter which has not been contested. This case will require interpretation of the Code and the Guidelines may provide conceptual or philosophical analysis useful to my making that interpretation (Transcript, v.10, pp.3-4).

That is to say that while the Guidelines should be considered, and while Ms. Frazee's evidence could be used to help interpret them, they would not be authoritative or binding upon a board of inquiry.

In her argument, Counsel for the Commission urged that the Guidelines should be accepted. She provided two arguments. First, since the Human Rights Commission is the organization responsible for enforcing human rights in Ontario, and is an expert organization, the Guidelines "should be very persuasive" (Transcript, v.11, p.56). Second, American jurisprudence supports giving interpretations by enforcement agencies "great deference." The case cited was Griggs v. Duke Power Co., 401 U.S. 424 (1971). The court looked at guidelines developed by the Equal Employment Opportunity Commission, and there said,

The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines to permit only the use of job-related tests. With respect to such guidelines the court noted that the administrative interpretation of the Act by the enforcing agency is entitled to great deference (p.178, footnote 9).

In reply Counsel for the Respondent presented several arguments. First, she appealed to two decisions made by administrative tribunals. Counsel presented both of these decisions as support for "the general proposition of law that tribunals and courts are not bound by policy pronouncements made by administrative agencies (Transcript, v. 12, p.81)." Since Counsel for the Commission did not deny this principle, I shall not further investigate it here.

Second, Counsel for the Respondent noted that in Elliot v. Epp Centres Inc., unreported Ontario Board of Inquiry, June 22, 1993, the Guidelines were also introduced into evidence. Counsel then pointed out that they were not, however, referred to by the Chair in reaching her conclusion.

Third, Counsel noted that in Griggs v. Duke Power the court continued on after the above quote to cite several cases and then said,

Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.

Counsel then argued that because the Guidelines expand upon what the case law says and upon what the Code says, they should not be treated analogously to those in Griggs.

In reply Counsel for the Commission argued that the chair's decision in Elliot v. Epp Centres Inc. refers to the Guidelines when discussing the evidence of Ms. Frazee, who was there called as an expert witness (p.10).

Ms. Frazee described the Guidelines for Assessing Accommodation Requirements for Persons with Disabilities. These were developed by the Human Rights Commission to become regulations to accompany the changes to the Code made in 1988. The 1988 amendments required accommodation be made to allow disabled persons to take full advantage of the Ontario workplace and wider community. To date these Guidelines have not been adopted as regulations.

Counsel then concluded that "obviously this evidence played some role in influencing the Board's decision in that case (Transcript, v. 12, p. 129).

Counsel also argued that legislative history does support the Commission's referring to "the apparently conscious policy decision of the legislature to leave out the word "reasonable" and to use only three factors when referring to undue hardship (Transcript, v.12, p. 130)." This would support the application of the principle in Griggs.

The arguments of Counsel for the Commission do not persuade me that I should give the Guidelines such weight as to consider them "persuasive" or to entitle them to "great deference." First, the question of accommodation for the handicapped has little legislative history in Canada, and it has not been shown that the principles of the Guidelines play a role in that history. One legislative policy decision which is reflected in the Guidelines does not show that the legislative history supports the complex set of principles embodied in the Guidelines. The position enunciated in Griggs accordingly does not apply here. Further, although the Board mentioned them in the "Fact" section of her decision in Elliott, the Board did not refer to them in any way in reaching her findings, nor is there

any at all clear tie to them in any of that section. The Commission's views, as expressed in the Guidelines, are carefully considered and should be looked at seriously if there is any question of how to interpret the Code. But they are not themselves immune to critical analysis, nor should they take the place of independent interpretation on the part of boards of inquiry.

With that matter settled, let me now turn to the question which first occasioned the discussion of the Guidelines, namely whether accommodation in this case involves providing access with dignity or providing access which most respects dignity. I believe the Commission has here conflated the categorical and comparative senses of respecting dignity, and in doing so has provided a different standard from that of the Code.

An example will illustrate this point. Assume there are three men, one seven feet tall, one six and one half feet tall and one five feet tall. In a categorical or absolute sense the first two men are tall, while the third man is not tall. In a comparative sense the first man is taller than the others, and the tallest of the three. But if one were sent to find a tall man, then either the first or second would be equally acceptable.

Now, the preamble of the Code uses the phrases "recognize the dignity" and "respect for the dignity" of people. It does not speak of being more or less respectful. In any given case some actions will respect dignity and some will not. Some will more respect dignity than others. But if two actions so compared both do not respect dignity, then they will both fail to meet the standard prescribed by the Code. Further, if such actions both respect dignity, then they both meet the standard, even if one of them should be more respectful than the other.

The needs of persons with disabilities must be accommodated in a manner which respects their dignity: In many cases this may well be the manner which in the given case most respects their dignity. But, contrary to the position prescribed by the Guidelines, it need not be so in every case. In some cases there may be various accommodations all of which meet the needs and respect the dignity of persons with disabilities. Even if one should be the most respectful of dignity, it does not follow that the others will be in contravention of Sections 1 or 11 of the Code. To require respect for dignity is to make a high demand on behaviour. To adopt the requirement of the Guidelines would be to set an even higher standard and one which goes beyond that of the Code. Accordingly, I shall here use the interpretation previously mentioned, namely that the mobility impaired will be treated equally only if they are provided with access to the second floor in a way which meets the physical needs occasioned by their disability and does so in a way which respects their dignity.

USE OF ELEVATOR

Evidence to show that the needs of the Complainant were or were not met by the use of the freight elevator concentrated on three primary considerations: (a) the length of the wait before receiving employee assistance, (b) the appearance of the elevator and the waiting area, and (c) the requirement that there be employee assistance to operate the elevator. Counsel for the Commission called as witnesses on these matters Mr. John Barber, Ms. Marnie Elliot, and Mr. Robert Topping. Counsel for the Respondent called Mr. Peter Yourkevich, Mrs. Verna Rolland, Ms. Julia Bourque, Mr. Scott McArthur and Mr. Scott Cortese. In addition, in accordance with Section 39 (5) of the Human Rights Code, the board took a view of the physical layout of the store and elevator on March 16, 1993. The taking of the view was not announced to the employees of the Sears store at Pen Centre.

Evidence of Mr. Barber

Mr. John Barber is the husband of the Complainant. He was with Mrs. Barber on many occasions when she visited the Sears store, and testified both to the conditions there and to Mrs. Barber's view about them. Mr. Barber first described the elevator prior to the renovations in 1991. He stated that the foyer and the elevator were cluttered and dirty. The elevator had bare steel walls, with doors opening top to bottom. He stated that it usually took 10 to 15 minutes to have an employee come, to have any freight removed, and to be transported between floors. The wait could be as much as half an hour.

He stated with respect to Mrs. Barber, "she felt that it was an insult to be asked to travel on the freight elevator, that it was like going in the back door."

Mr. and Mrs. Barber continued to shop at Sears two or three times a month after the changes to the freight elevator were completed. He described the changes as follows.

They put a wall up in the storage area, made a nice room there; they painted the walls, put tile on the floor; and the elevator itself had paint and up to about four or five feet they put rug covering on the walls. Also they put in a buzzer, both floors, first and second floor, for to summon the attendant, and they made their wheelchair access and elevator signs more visible (Transcript, v.2, p.28).

He stated that there was no change in the time they had to wait: five to ten minutes for the attendant, and up to half an hour. With respect to the attendants, Mr. Barber agreed that they were polite, pleasant, and respected them both as individuals.

Mr. Barber described Mrs. Barber's feelings about the elevator as unchanged after the renovations.

Patricia still felt like a second-class citizen, she was asked to go in the back door, she couldn't operate the elevator herself, and she had to wait. She would get angry, she felt a loss of dignity and she was frustrated that Sears had ... so little concern and respect for their good customers (Transcript, v.2, p.29).

Evidence of Ms. Elliot

Ms. Marnie Elliot has used a wheelchair for thirty years. She has shopped at the Sears store at the Pen Centre since she moved to St. Catharines in 1980. She shopped there at least once a week until the last two or three years, but now goes about every six weeks. She testified to the condition of the elevator both before and after the renovations.

She described the elevator before the renovations by quoting a friend who wouldn't go on the elevator and called it "a hole".

It was like going through a back alley, the catalogue department was at one side on the ground floor, but there was (sic.) always things hanging on a rack, clothing on a rack, there was (sic.) piles of stuff on the other side, sometimes barely room to get the wheelchair in and to the elevator, messy and uncoordinated as far as I was concerned, and very dirty looking (Transcript, v.2, pp.53-54).

The elevator itself was "scary".

The doors come up from the bottom and down from the top and clang with a loud metallic jail door sentence sort of thing, the clanging of the metal. The walls are cinder brick as you're going up, you can see graffiti written on the walls, you're in a cage but it's an open cage. Although it was big and I knew it handled freight I never felt secure in it, it -- I'm not used to seeing the walls move as the elevator moves, it's not very pleasant.

Ms. Elliott testified that there was often a significant waiting period. She had to go to find a salesperson, which could take ten or fifteen minutes. Sometimes freight had to be taken off the elevator before she could get on, which could take another five or ten minutes. On average she said she "would spend over a half hour in waiting to get on and then waiting to get back off" (Transcript, v.2, p.57):

Ms. Elliot testified that the modifications have produced an area more pleasing to look at, but that the service isn't any better. She still had to spend time finding a salesclerk, and has still had to put in a half hour waiting. She stated she was not aware of the buzzer system which has been installed.

Ms. Elliot described having to have employee assistance, and having to use the freight elevator as follows.

I feel like I should say "Thank you very much for allowing me to shop in your store, is my money good enough for you?" I feel degraded. Other people can come into the store, go to the escalator, and get what they want, they don't have to come and say "Help me onto the escalator, help me off the escalator." The escalators are built for regular walking people, there's nothing for me, and to go through a back door and through garbage rooms isn't the most appealing way to enter a room -- enter a building . . .

I don't like being considered lower class, second class, retarded, or whatever you want to call it, but having to use the freight elevator does not give me any dignity, and unless I've got definite business upstairs I don't want to go. It's hard on ones personality, ones modesty, what ever you want to -- the whole atmosphere of it isn't very pleasant. To always have to go through someones back door is -- I feel like I'm a criminal and I'm sneaking in, like I'm not allowed through the front door, I've got to go through the back door (Transcript, v.2, pp.61-62).

Evidence of Mr. Topping

Mr. Robert Topping is an architect who was qualified as an expert on barrier free design. He was a reply witness to Ms. Bourque's evidence and to Mr. Yourkevich with respect to alternate locations for any required passenger elevator. He testified both generally about barrier free access and specifically with respect to the Sears store at Pen Centre. He stated that barrier-free design should consider function, safety and dignity, and noted that the latter must be considered in order to meet the intent of the various human rights codes. Mr. Topping gave the following as an example of the difference between a dignified and undignified design solution.

The one that's most often bandied about has to do with entry into a building and for a long time, or for a while until codes and legislation caught up, that disabled persons were often relegated or given a different entrance to come into in the building for a variety of reasons, some even being through areas such as service areas and loading docks. Whilst it is clear

that sort of level access through a loading dock does provide access into a building, in our opinion it certainly isn't dignified access and in that regard we do not make any recommendations around those sorts of issues (Transcript, v. 9, pp. 99-100).

Mr. Topping visited the Sears store at Pen Centre prior to testifying. His opinion was that the equality and dignity of disabled persons was compromised by having to use the freight elevator. He gave two reasons. First, a disabled person cannot use the elevator autonomously, whereas a normally abled person "has the option of using the stairs or the escalators to independently achieve access between floors (Transcript, v.9, p.111). Second, the elevator "looks like a freight elevator, and to ride in it can be somewhat intimidating for anyone" (Transcript, v.9, p.111). He stated that it was intimidating in that it was very large, had a different door opening mechanism than a passenger elevator, and much lower light levels than is usual for passenger elevators. He noted that when he was visiting Sears two women, one with a stroller and child, entered the foyer area, and upon seeing the elevator said, " 'I am sorry. I couldn't handle that' and they turned around and actually left (Transcript, v.9, p.112)."

Mr. Topping testified that he normally recommended going beyond the five-foot diameter turning circle for wheelchairs in elevators which is considered appropriate in the Ontario Building Code and the CSA standard. He agreed in cross-examination that the freight elevator at the Sears store at Pen Centre provides the space he recommends. He also agreed that there may be many reasons, such as those with fear of heights being afraid of glass elevators, why people can't handle elevators.

Mr. Topping stated that "the general consensus of opinion among consultants in Ontario is that freight elevators are not an acceptable means of access (Transcript, v.9, p.116)." His reason for this belief came because in preparing for the hearing he had spoken to seven barrier free design consultants, and six of the seven articulated the opinion that a freight elevator would not be an appropriate means of access.

Counsel for the Respondent argued that this part of Mr. Topping's evidence should be discounted because it was hearsay and that the alleged opinions could not be subjected to cross-examination. I agree that it is hearsay and it should be accorded lesser weight. Further, Mr. Topping did not specify the questions asked or state the details he gave of the upgrades made to the elevator and its surroundings. Because of this, and because the condition of the elevator and its surrounding area is quite unusual, this aspect of Mr. Topping's evidence will not be used.

Evidence of Mr. Yourkevich

Mr. Peter Yourkevich is the National Manager, Visual Merchandising, Display, Art, Signing, Photography at Sears. He has also made himself the advocate within Sears for barrier-free access. Mr. Yourkevich is a bilateral above-knee amputee. Whereas he can walk for a certain duration, he carries a wheelchair in his car at all times and uses it rather than attempting to walk for any length of time. He is familiar with the Sears store at Pen Centre, and has been involved in considerations of Mrs. Barber's complaint from the beginning.

Mr. Yourkevich stated that he visited the store prior to the renovations to the elevator. In the general elevator area the floors and walls were unfinished and there were no ceilings. The elevator itself was simply a metal cab. The area surrounding was tidy when he visited early in the morning.

Mr. Yourkevich described the changes to the elevator and elevator area (in the way I have previously detailed in the section "Renovations to Elevator"), and the procedures for employees in operating the freight elevator and in dealing with persons who wished to be transported (Exhibit #14). After the modifications were completed he visited the store twice to test the procedures. He visited in Summer, 1992 with his wife, and later with Mr. Wayne McCullough of the Human Rights Commission, a co-worker of Mr. McCullough, and Mr. Yourkevich's own superior, Mr. George Rogers. He stated that he was not known to the staff persons of the store, and that he had not made contact with the store in advance. On both visits he was in his chair. In both cases, and on both floors, a salesperson responded to the buzzer within one minute.

Mr. Yourkevich testified that he does not find it a slight to his dignity to have someone operate the elevator for him in the Sears store at Pen Centre. He noted that there is an elevator operator when he goes to the Skydome. He travels a lot by air, and because there are long walks to the gates takes

advantage of the wheelchair that's available, and both airlines push you to the gate, they don't allow you to wheel yourself, but I've accepted the reality that sometimes I need to ask for assistance, but I don't feel it's an affront to my dignity because it's given to me (Transcript, v.3, p.140).

Mr. Yourkevich stated that Sears has a policy of installing passenger elevators in new stores, and that they might do so when renovating older stores. In cross-examination he stated that this is because Sears tries to give the best access to their stores which they can, and that a passenger elevator is the best access.

He also testified that he preferred to do things for himself. This is because, "As most people I have a pride in doing things myself, but I also recognize there is (sic.) limitations to what I can do and if I need [to] ask for assistance I do (Transcript, v.4, p.36).

Evidence of Mrs. Rolland

Mrs. Verna Rolland is a resident of Jordan Station, which is near St. Catharines. She shops at the Sears store at the Pen Centre about twice a month. She has used a wheelchair for a year and a half, and before that used two canes or a walker as assistive devices. Her wheelchair is a special order chair which is wider than most.

Mrs. Rolland stated that the lobby area is quite wide with "lots of room to turn around (Transcript, v.4, p.108)." She has not had a problem with debris or stuff cluttering the aisles. She has used the self-operated elevator at the Eaton's store in the Pen Centre Mall, and has found it to be smaller and to require a lot of jockeying to turn around. This is not the case with the Sears' elevator.

Mrs. Rolland has found that it is usually only a couple of minutes after she presses the buzzer before a salesperson responds. Once it took three or four minutes. The salespeople who have responded have always been courteous and polite.

Mrs. Rolland testified that it does not bother her to have a person operate the elevator for her. It does not make her feel like a second-class citizen. In reply to a question from Counsel for the Commission, she stated that she prefers to do things for herself whenever possible because she likes to be independent.

Evidence of Ms. Bourque

Ms. Julia Bourque is an architect who was qualified as an expert in barrier-free design. She was hired by Sears to evaluate access for persons with disabilities at the Sears store at Pen Centre. Her opinion, as stated in her report (Exhibit #23), was that the "store provides a very high level of access throughout the facility, although there is need for some improvements in and around the elevator and in both the mens and womens washrooms." When she visited the store she noted

that Sears had taken a lot of trouble ... to make the aisles quite wide, to lower the displays so that they were within reach of most consumers, anyone in a chair or anyone standing; ... the lighting was quite clear, the signage was very clear; it was easy to get in and out of the store through the entrance.

Compared to similar stores, "It was by far the most accessible department store of its type that I had seen (Transcript, v. 5, pp. 12-14).

Ms. Bourque recommended that it would be acceptable if the freight elevator were modified to be used by passengers with a trained attendant, as long as there was not a significant wait for the elevator, that the location was clearly indicated, and if the area was cleared of all packaging and debris. She did not believe there would be a problem for access in requiring an attendant to operate the elevator, because

historically we've used elevator attendants in our elevators. It isn't that long ago that, you know, the Eatons College Street store had elevator attendants and nobody thought that that was an undignified way to ride an elevator (Transcript, v.5, p.10).

In cross-examination Ms. Bourque testified more generally about access. She explained that the thinking behind the practices of not providing access through loading docks and of providing disability seating at various places in theaters was that "what you want to provide is dignity and safety for all users ...(Transcript, v.5, p.34)." She stated that determining what constitutes a design solution respecting dignity required consulting users, that it was a collaborative process. In making her recommendations to Sears she consulted salespeople who knew how to run the elevator, but did not consult with any psychologists or social policy experts. Her conclusion was that the freight elevator was one which many people found dignified. Ms. Bourque agreed that a passenger elevator is the type of device which most respects dignity.

Evidence of Mr. McArthur

Mr. Scott McArthur is the Manager of Training and Development for the Ontario Federation for Cerebral Palsy. He provides training for staff across Ontario who provide support services for people with disabilities. He is himself disabled with two types of cerebral palsy; he has athetosis which causes involuntary movements, and is spastic, which causes his muscles to be stiff and rigid. This affects his speech and all four limbs. He has no hand control, and uses a computer with a mouth stick. He uses a wheelchair for mobility. Mr. McArthur visited (anonymously) the Sears store at Pen Centre before testifying.

Mr. McArthur described a number of problems he had encountered in using passenger elevators without attendants. Sometimes call buttons are too high or too small. Doors sometimes close too quickly. Some elevators are of a size where he cannot turn around, so he does not know which floor he is on. He has sometimes been stuck in elevators. With respect to his

preference in using elevators he said, "If I could use an elevator by myself, that's the one I would prefer to use. But if I couldn't use it, I would want staff who were willing to assist me to use it (Transcript, v.8, p.110)."

Mr. McArthur testified with respect to the appearance of the elevator foyer area as follows.

It was well-lit. On the first floor you go under a little hallway ... so you could be seen by people in the store. You weren't isolated. It wasn't in a back hallway that hadn't been finished. It was painted and tiled (Transcript, v.8, p.105).

He compared this favourably to accesses to freight elevators in other locations which are usually "just concrete brick with garbage all over the floor." Of the appearance of the elevator itself, he said, "you could tell it was a freight elevator that had been carpeted, and the lighting wasn't great, but it was better than most freight elevators I've been on (Transcript, v.8, p.106)."

Mr. McArthur said that he had difficulty in ringing the buzzer because the button was too small, but once he was able to hit it salespeople responded within 15 seconds. While on the second floor he was approached by two staff and asked if he needed any help. He questioned one of them about who was responsible for responding to the elevator call. He was told that it was whomever is on cash in the ladies department. They respond immediately unless they are cashing out a customer. The response time is less than a minute.

The salesperson said that during her five hours of duty a day she might get five or six wheelchair calls. Mr. McArthur stated he saw two other people who used wheelchairs while he was in the store and that all the handicapped parking spaces were filled. He noted that he does not shop where he does not feel comfortable, and stated that if the store wasn't accommodating people with disabilities, he did not think he would see as many people with disabilities shopping there.

When asked whether using the freight elevator infringed his dignity, he replied as follows.

No, I don't think so. I think infringement -- indignity is when you have to go in dark hallways through garbage. It wasn't off in some other part of the store. It wasn't going in a dark door.

You know, I won't shop in a store that has one step to the outside. People say, "Oh, we don't mind helping you," but it's not dignified to have people carry you up. I've seen lots of other places where it

isn't dignified.

And the assistance I received wasn't patronizing. It was very professional and sensitive. If the lady was patronizing, then maybe I would have felt undignified (Transcript, v. 8, p.109).

Evidence of Mr. Cortese

Mr. Cortese is a licenced private investigator. He is employed by Equifax Canada as Claim Director and as an investigator. He was hired by Mr. Yourkevich to conduct an investigation at the Pen Centre Sears store in order to document the response time of Sears employees to the elevator buzzer. This was done by two investigators, Mr. Cortese and Ms. Diebold, who appeared independently in wheelchairs as shoppers and timed the response time. They appeared for six consecutive days, and in total rang the buzzer 22 times. Only Mr. Yourkevich and Ms. Currie knew that they had been retained.

On two occasions the response time was just over three minutes. On two occasions the response time was approximately ninety seconds. On five occasions the time was approximately one minute. On thirteen occasions the response time was under 30 seconds.

Mr. Cortese testified that the staff were very courteous and responsive and that the elevator was clear of boxes and free of debris on each of the occasions.

DECISION

There are three general questions to be considered in evaluating the evidence. First, does the length of wait before gaining use of the freight elevator discriminate against the mobility impaired? Second, do the placement of the elevator or the means of access to the elevator, or the physical surroundings of the access or the elevator, infringe the dignity of persons who use wheelchairs for mobility? Third, does the need for employee assistance to operate the elevator infringe the dignity of the mobility impaired? These will be considered in turn.

Length of Wait

If the time it takes the mobility impaired to gain access from one floor to another is significantly different from that of persons without such impairment, then the mobility impaired are not being given equal access. The proper comparison is with a passenger elevator rather than with the existing escalator, since a passenger elevator is the alternative means of access discussed and is physically accessible to the mobility impaired, while the escalator is not. Access to passenger elevators can be immediate, but there can also be a wait if they need to come from

another floor, have passengers who must egress, or have other individuals waiting to use them. A wait of a minute or two would not be unusual. But a wait of fifteen minutes or a half an hour certainly would be. Such lengths of waiting for the freight elevator at the Sears store at Pen Centre would discriminate against the mobility impaired because of handicap.

Mr. Barber and Ms. Elliot testified that after the renovations to the elevator there was still a wait of five minutes to half an hour. Ms. Elliot was not aware of the buzzer system, and so spent time physically searching for an attendant. Accordingly, her evidence on timing must be discounted. Mr. Yourkevich, Ms. Rolland, Mr. McArthur and Mr. Cortese testified to much shorter waits. With the exception of three waits of three minutes, all waits were a maximum of a minute or two, and most were under a minute. Short waits were also the experience of the Board when taking a view.

The balance of evidence is that the current wait is generally a short one, and that long waits such as those testified to by Mr. Barber are unusual. On the whole the wait seems relatively comparable to the use of a passenger elevator. I accordingly rule that the wait required for using the freight elevator does not constitute unequal treatment of the mobility impaired.

APPEARANCE OF ELEVATOR

Several witnesses and documents in this case have focussed upon what is now a standard example of undignified access to a building, namely, through service areas and loading docks. This involves going through areas not meant for the general public, which often have an unpleasant appearance and bad lighting, and which are often strewn with garbage. It was clear from the evidence that while the condition of the elevator and the foyer before the renovations was not of this level, it was significantly similar. The walls in the elevator area were unfinished and there were no ceilings. The elevator was bare metal and there was graffiti on the walls of the elevator shaft. Customers encountered merchandise stored in the foyer area such that it was sometimes hard to get a wheelchair through the merchandise to the elevator.

In these circumstances talking, as did Mrs. Barber and Ms. Elliot, of going through the "back door" would seem appropriate. The conditions of service offered to the mobility impaired for going from one floor to another were very different from those offered other customers, and involved providing physical surroundings of a much lower quality than those provided in all other customer areas of the store. Such conditions did not provide access with dignity.

The renovations and alterations undertaken by Sears have, however, changed the physical surroundings considerably. The storage areas have been walled off, and the elevator foyer areas decorated comparably to the other customer areas of the store. The foyer is next to a sales area, and provides access to the elevator without having to go through a back hall or area not appearing to be meant for the general public. This change in appearance is noted by Mr. Barber, Ms. Elliot, and Mr. Yourkevich. Mr. McArthur was not familiar with the previous appearance, but commented favourably upon the current appearance.

Mr. Barber reported that Mrs. Barber still felt, after the renovations, that she had to go in the "back door". Ms. Elliot commented that having to go through a "back door and through garbage rooms isn't the most appealing way to enter a room." Mr. McArthur commented that using the elevator did not infringe his dignity, in part because, "It wasn't off in some other part of the store. It wasn't going in a dark door."

Now, in light of the physical changes, it is clear that going to the freight elevator does not involve going through garbage rooms, or through a back route. It involves entering a foyer comparable to that of any elevator foyer. Accordingly, the references to "back door" made by Mrs. Barber and Ms. Elliot must be taken metaphorically as referring to the use of a freight elevator as such, rather than to the actual physical conditions of the elevator access.

The elevator itself was painted and carpeted, and the door closing mechanism was modified for safer and smoother operation. Mr. McArthur noted that it still looked like a freight elevator, but one which was better than most freight elevators he had seen. Ms. Elliot was concerned, talking of the state of the elevator before renovations, with the clang of the doors when closing, with the graffiti on the walls, and with seeing the walls when the elevator moved. She did not comment upon her perceptions after the walls were painted and the door mechanism modified, but the causes of the first two concerns would seem to have been eliminated. Mr. Topping thought the elevator could be somewhat intimidating for anyone, because of the size, vertical opening of doors, and low lighting. Mrs. Rolland commented favourably upon the elevator because of its size.

The modifications to the freight elevator do not convert its appearance to that of a passenger elevator. Its modifications allow it to function safely in carrying passengers. It is now cosmetically closer in appearance to the customer area than to a service area. On balance it has not been shown that this elevator's present appearance is intimidating to those who have used it.

Overall, the renovations to the elevator and the areas surrounding the elevator have significantly altered both the appearance and nature of the access. In these ways access to the second floor in the Sears store at Pen Centre is very far from the paradigm example of undignified access given above. I accordingly rule that in this particular the Commission has not shown that the mobility impaired are currently provided with undignified and thus unequal access to the second floor of the Sears store at Pen Centre.

ASSISTED ACCESS

There was unanimity among the witnesses that they would prefer to do things for themselves rather than have assistance. Based upon this they would prefer to have a passenger elevator which they could comfortably operate themselves to a freight elevator which requires assistance to operate. This would not mean that any and every passenger elevator would be preferred. Mrs. Rolland thought the passenger elevator in the Eaton's store was too small and liked the size of the freight elevator in Sears. Mr. McArthur described several passenger elevators which were too small or which had controls he could not operate. But in general an elevator which met their physical needs and which they could independently operate would be preferred to one which they could not independently operate. Further, both expert witnesses agreed that a passenger elevator is the type of device which most respects dignity.

The question here, however, is whether the freight elevator in the Sears store at Pen Center provides access with dignity. As I have previously noted this is a very different question than whether it provides the most dignified access to the second floor which could be provided. With respect to this question the witnesses are very much divided.

Ms. Bourque stated that with the suggested modifications the freight elevator would provide access with dignity, and noted that some passenger elevators have historically had attendants. Mr. Topping believed use of the elevator at Sears was undignified because the disabled person could not use the freight elevator autonomously, while the person without a disability could use the escalator to independently achieve access. Reliance upon the authority of the experts only leaves a balance of opinion here.

Nor can a decision follow from the reasons they give. In Ms. Bourque's example those who are mobility impaired and those who are not would both be physically able to use successfully the elevator in precisely the same way, and there would be no need to refer to the question of dignity.

Moreover, Mr. Topping's reason does not settle the matter. Autonomy is a complex moral concept, and it is undoubtedly an

important component of human dignity. It is usefully defined in David Roy, John Williams and Bernard Dickens, Bioethics in Canada (Prentice Hall, Scarborough, 1994), p. 115.

Autonomy, or self-determination, implies the need and the capacity to deliberate about personal goals, and the liberty to act accordingly. A relationship that fosters autonomy is notable for the absence of fraud, force, and the tendency to use another human being as a disposable resource.

Autonomy is a different concept from physical independence. If a person required assistance in order to eat, but was able to decide when and what to eat, that person would be autonomous with respect to eating though not physically independent with respect to eating. Autonomy is a necessary condition of dignity; physical independence is not. As was seen in the testimony of all the witnesses, independent living and the doing of what can be done without assistance is important; they all prefer doing things for themselves. But their testimony made it clear that they do not all consider receiving assistance in operating the elevator an affront to their dignity. This is not a result of conceptual confusion.

It is accordingly necessary to turn to the evidence of the witnesses who were mobility impaired. Mrs. Barber and Ms. Elliot did feel it undignified to have to have assistance with the elevator. Mr. Yourkevich, Mrs. Rolland and Mr. McArthur did not. The question is whether there is reason to prefer one set of testimony to the other.

Counsel for the Commission suggested in argument that "it is important to take the perspective of people who are enlightened about their rights in deciding what human rights is all about. If you look around anywhere, and I can take any ground of discrimination, there are women who still think it is okay to be treated as slaves (Transcript, v. 12, p.111)." She stated that evidence had been given by persons with disabilities who are active in the disability rights movement [presumably Mrs. Barber and Ms. Elliot], that the freight elevator at Sears is undignified. On the other hand, Counsel for the Respondent pointed out that Mr. Yourkevich chairs the Assisted Devices Steering Committee for the Ministry of Health and that Mr. McArthur was a disability rights activist.

I am not persuaded that being an activist in a rights movement necessarily qualifies one to know what human rights are all about. Activism and thoughtful analysis do not always go hand in hand. Further, ordinary citizens normally are able to decide whether something is an affront to their dignity or not.

Be this as it may, it is clear that of the four disabled witnesses who are knowledgeable about matters of particular concern for the disabled, two of them believed their dignity to be violated by staff assistance in the freight elevator of the Sears store at Pen Centre, and two thought that it provided access with dignity. Because of this, and because of the considerations above, I hold that, on balance of probabilities, it has not been shown that the use of assisted access in the operation of the elevator produces undignified access to the second floor.

Overall Decision

When the complaint was first brought in 1988 the uncontested evidence is that there were long waits and that the physical conditions of the elevator were of a much lower quality than were those provided in all other customer areas of the store. The elevator did not provide dignified access for the mobility impaired. I accordingly hold that Sears Canada Inc., Pen Centre did infringe Mrs. Barber's right to equal treatment with respect to services, which is guaranteed under Section 1 of the *Human Rights Code*. They were accordingly in violation of Section 9 of the *Code*. I order, under Section 41 (b), that the estate of Mrs. Barber be paid general damages of \$1000.00 as compensation for the loss to Mrs. Barber's dignity arising out of the infringement.

With respect to the current condition of the elevator and its surroundings, the evidence has shown that the mobility impaired are provided with access between floors at Sears Canada Inc., Pen Centre in a way which meets the physical needs occasioned by their disability. On the balance of probabilities, it has not been shown that the needs are met in way which does not respect their dignity, and accordingly has not been shown that their right to equal treatment with respect to services has been violated. I thus hold that Mrs. Barber's right to equal treatment with respect to facilities, without discrimination because of handicap, is not currently contravened by the use of the freight elevator at the Sears store at Pen Centre for access to the second floor. The alterations to the elevator and its surroundings and the training of employees have accommodated Mrs. Barber's needs in this respect. I accordingly need not issue any further order to achieve compliance with the *Code*.

Dated at *Toronto*, this 3rd day of May, 1994

H.A. Bassford
H.A. Bassford
Chair
Board of Inquiry

